24-303

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1070.

THE UNITED STATES, APPELLANTS,

vs.

DAVID MOUAT.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 27, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1070.

THE UNITED STATES, APPELLANTS,

vs.

DAVID MOUAT.

APPEAL FROM COURT OF CLAIMS.

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In the United States Court of Claims.

I.—*Petition.*—*Filed March* 19, 1886.—*J. R.*

DAVID MOUAT
vs.
THE UNITED STATES. } No. 14,856.

To the honorable the judges of the said court:

The claimant, David Mouat, respectfully showeth as follows:

I. That on the 16th day of November, 1885, he was appointed a paymaster's clerk in the United States Navy, on board the U. S. receiving ship "Vermont," subject to the laws and regulations governing the United States Navy. That the said appointment was approved by Capt. A. P. Cooke, commanding the "Vermont," and by D. B. Harmony, Acting Secretary of the Navy. That on the 19th day of November, 1885, he accepted by letter said appointment, and on the same day took an oath to comply with and be obedient to such laws, regulations, and discipline of the Navy as were then in force, or that might be enacted by Congress, or established by other competent authority. Copies of the said appointment, the letter of acceptance, and the oath are hereto annexed as Exhibit No. 1.

II. That when he received said appointment he was in Chicago, in the State of Illinois, where the appointment was addressed. In the said letter of appointment he was directed to proceed to New York via Washington, D. C. That after his acceptance of said appointment, and
2 taking the oath aforesaid and the oath to support the Constitution of the United States, and to faithfully discharge the duties of the office upon which he is about to enter, he proceeded to New York via Washington, D. C., and on November 30, having arrived in New York, reported at the navy-yard for duty as directed.

III. That under the Army mileage table, which has been adopted by order of the Secretary of the Navy as the correct table of distances in the United States, and as the standard for determining the distances travelled by officers in the naval service, the distance from Chicago to Washington, D. C., is 813 miles, and from Washington to New York 228 miles, the whole distance travelled under orders being 1,041 miles.

IV. That under the act of Congress of June 30, 1876, he was entitled to be allowed and to receive the sum of eight cents per mile for this disance, the same being $83.28.

V. That upon the presentation of his claim for the above amount of mileage the same was settled and allowed by the Fourth Auditor of the Treasury, but was not allowed by the Second Comptroller of the Treasury, and that the claimant has not received any part thereof.

That since the passage of the act of June 30th, 1876, it has been the practice to allow mileage to paymasters' clerks who were ordered to sea-going vessels upon travel as performed within the United States from July 1st, 1876, to Feb'y 5th, 1886. It has never been the practice to consider clerks employed by pay officers on shore stations as entitled to mileage.

VI. No assignment or transfer of this claim, nor of any part thereof, nor of any interest therein, has been made; the claimant is justly entitled to the amount claimed in this petition from the United States after allow-

ing all just credits and set-offs; he is a citizen of the United States, and has at all times borne true allegiance to the United States, and he believes the facts stated in the petition to be true.

Wherefore he prays judgment against the United States in the sum of $83.28.

DAVID MOUAT.

LINDEN KENT,
Att'y for Claimant.

3 The post-office address of the claimant is, Receiving Ship "Vermont," New York.

The post-office address of his attorney is, 1505 Penna. ave., Washington, D. C.

STATE OF NEW YORK,
County of Kings, ss:

Personally appeared before me David Mouat, the above-named claimant, and made oath that the matters in the foregoing petition averred are true so far as they are averred of his own knowledge, and that so far as they are averred on the information of others, he believes them to be true.

DAVID MOUAT.

Sworn before me this the eighteenth day of March, A. D. 1886.

[SEAL.] JNO. G. MORISON,
Notary Public.

EXHIBIT No. 1.

NAVY DEPARTMENT,
Washington, D. C., 16 *November*, 1885.

SIR: You are hereby appointed a paymaster's clerk in the United States Navy for duty on board the U. S. receiving ship Vermont, subject to the laws and regulations govering the United States Navy.

You will sign the letter of acceptance, and execute in due form the oath appended hereto, and return the same to me.

4 You will proceed to New York via Washington, D. C., and report to Commodore Chandler for duty on board that vessel.

Very respectfully,

E. W. WHITEHOUSE,
Paymaster, U. S. Navy.

DAVID MOUAT,
Paymaster's Clerk, U. S. Navy, Chicago, Illinois.

Approved.

A. P. COOKE,
Captain, Commanding Officer.

Approved.

D. B. HARMONY,
Acting Secretary of the Navy.

On margin:

COMMANDANT'S OFFICE NAVY YARD,
New York, Nov. 30, 1885.

Reported.

W. A. KIRKLAND,
Captain, Commanding.

Agreement.

CHICAGO, ILLINOIS, *Nov. 19th*, 1885.

SIR: I hereby accept the appointment of paymaster's clerk, U. S. N., dated Nov., 1885, tendered me by you, and I do hereby oblige and subject myself during my service as paymaster's clerk, U. S. N., to comply with and be obedient to such laws, regulations, and discipline of the Navy as are now in force, or that may be enacted by Congress, or established by other competent authority.

DAVID MOUAT,
Paymaster's Clerk, U. S. N.

Paymaster E. W. WHITEHOUSE, *U. S. N.*

5 Sworn to and subscribed before me, at Chicago, Illinois, this 19th day of Nov., 1885.

[SEAL.] EDWARD S. JUDD,
Notary Public.

Having been appointed paymaster's clerk U. S. N., I, David Mouat, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God.

DAVID MOUAT,
Paymaster's Clerk U. S. N.

STATE OF ILLINOIS,
County of Cook, ss:

Sworn to and subscribed before me, this 19th day of Nov., 1885.

[SEAL.] EDWARD S. JUDD,
Notary Public.

6 II.—*Demurrer.—Filed Feb'y* 10, 1887.

And now come the said defendants, by their Attorney-General, and demurring to the petition in this cause, state as the ground thereof that the petition does not allege facts sufficient to constitute a cause of action.

ROBERT A. HOWARD,
Assistant Attorney General.

7 III.—*Opinion of the court.*

ON DEMURRER.

RICHARDSON, Ch. J., delivered the opinion of the court:

The claimant alleges in his petition that on the 16th of November, 1885, he was appointed a paymaster's clerk in the Navy; that he accepted the appointment November 19, 1885, took the oath of office on the same day, and entered upon his duties, and that he traveled 1,041 miles, under orders, for which he has not been paid. He claims 8 cents a mile, under the

provisions of the act of June 30, 1876, chapter 159 (Supp. Rev. Stat., 218, 219, par. 1) a'lowing that rate to "such officers [of the Navy] while so engaged [on public business] in lieu of their actual expenses."

The defendants demur upon the ground that the claimant is not an officer, and so not entitled to the benefit of the act. That presents the only issue in the case.

The claimant was appointed by a paymaster, with the approval of his commanding officer, according to the regulations, and his appointment was also approved by the Secretary of the Navy, and he took the required oath of office. This would be a valid appointment to office, within the meaning of the Constitution, if the position held by the claimant is an office and the Secretary of the Navy is authorized to make or approve such appointment. (United States *v.* Hartwell, 6 Wall., 393.)

The statutes recognize and provide for paymaster's clerks in the Navy, but are silent as to the manner of appointment (Rev. Stat., §§ 1386, 1387, 1388); and Revised Statutes, section 1410, classes them among "all officers not holding commissions or warrants, or who are not entitled to them," by excepting them, with others, from such officers as are to be deemed petty officers.

Upon the authority of Moore's Case (95 U. S., 760), it may be that the claimant should be held to be an officer in the constitutional sense of that term. Moore was called a "passed assistant surgeon" in the medical corps of the Navy. The statutes provided that the medical corps should consist of fifteen medical directors, fifteen medical inspectors, fifty surgeons, and one hundred assistant surgeons (Rev. Stat., § 1368) without mentioning passed assistant surgeons; that all appointments in the medical corps should be made with the advice and consent of the Senate (Rev. Stat., § 1369); that no person should be appointed surgeon until he had served as an assistant surgeon two years, and had been examined and approved for such appointment, &c. (Rev. Stat., § 1371). It had been the custom of the Navy Department to examine assistant surgeons for promotion as surgeons after a certain period of service, and often long before vacancies occurred to which they could be appointed, and when so examined and passed and while waiting for promotion to
8 the next grade, that of surgeon, upon the occurring of vacancies they were called "passed assistant surgeons." By that designation they were recognized in statutes fixing their pay and their rank, but no provision was made for their appointment.

Moore was an assistant surgeon who had successfully passed his examination for promotion to the grade of surgeon, and had been notified by the Secretary of the Navy that the report of the board of examiners was approved, and "from that date he would be regarded as a passed assistant surgeon."

The Supreme Court held that "the place of passed assistant surgeon is an office, and the notification by the Secretary of the Navy was a valid appointment to it," citing The United States v. Hartwell, 6 Wall., 385, and the Constitution. Art. II, sec. 2.

The position of the claimant in the Navy would seem to be as well established by law as an office, and his appointment to it as constitutionally made as the position and appointment of a passed assistant surgeon of the Navy.

In the present case, however, it is not necessary to go as far as the Supreme Court went in Moore's Case, nor to determine the question whether or not paymasters' clerks are officers within the meaning of the Constitution, but only to find whether or not Congress intended to include them among officers of the Navy to whom mileage is allowed by the act of 1876, even though they be so in a different sense from that in which the word is used in the Constitution.

In Hendee's Case, recently decided (22 C. Cls. R., —), we held that as paymasters' clerks were often called and regarded as officers in some sense, in statutes, in regulations of the Navy, in orders of the Secretary of the Navy, and in judicial decisions, as therein pointed out, they must be taken to be officers within the meaning of the act of March 3, 1883, chapter 97 (22 Stat. L., 473), requiring that "all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both," for the purpose of computing longevity pay, even though they might not be strictly and technically such within the meaning of the word as used in the Constitution with reference to appointments.

It seems to be generally understood that the words officers and enlisted men include the whole personnel of the Navy, regarding as enlisted men all those who sign articles of agreement, called "shipping articles," which paymasters' clerks do not, and whose only required oath is that they make true statement of their age according to the best of their knowledge and belief (Regulations of 1876, ch. XXV, par. 3), and as officers, all others who take the oath of office prescribed by Revised Statutes, section 1757, to be taken by all persons elected or appointed to any office of honor or trust under the Government of the United States, as do paymasters' clerks, as appears by copy of the claimant's oath of office attached to his petition.

Section 1417 of the Revised Statutes defines who are enlisted men and limits their number; and paymasters' clerks are not among them, while they are among those who take the oath of office.

On board ship, paymasters' clerks are quartered and mess with the officers, and are everywhere treated as such, whether at sea or on shore.

9 In United States v. Tinklepaugh (3 Blatch., 430, 431) it was held that a deputy marshal appointed by the marshal, without the approval of higher authority, was an officer because, as was said in the opinion of the court, "the statute shows that Congress deemed deputies of the marshal to be officers of the United States." The court in that case did not deem it necessary that a person should be appointed according to the provisions of the Constitution, in order to constitute him an officer of the United States within the meaning of the statutes there referred to.

Under these circumstances, and those to which we referred in Hendee's Case, we may well infer and hold that in the passage of laws like that under consideration, Congress used the word officers in its general, popular, and broad signification, rather than in its narrow and technical one, derived wholly from the operation of provisions of the Constitution in relation to certain appointments, and which, as one of the distinctions in the meaning of the word, has not yet found a place in the dictionaries.

At the argument both parties claimed that contemporaneous interpretations of the statute by the accounting officers of the Treasury supported

their respective positions. So far as such interpretation is entitled to weight, we think that, when considered on principle, it is favorable to the claimant's case.

It appears by the allegations of the petition, admitted by the demurrer, that ever since the passage of the act in 1876 paymasters' clerks have uniformly been paid mileage while attached to sea-going vessels, and have not been so paid when engaged on shore duty. There is no warrant for such a distinction. It is purely arbitrary. The statute allows mileage to officers of the Navy when traveling on public business, and if paymasters' clerks are officers in any sense they are entitled to mileage for travel, whatever be the public duty in which they are engaged. Continuously paying them mileage when attached to sea-going vessels concedes that they are officers, and if that be admitted in the one case it cannot be denied in the other.

Under another act the accounting officers made a similar distinction, which the Supreme Court overruled. The act of March 3, 1835, chapter 27, gave mileage at the rate of ten cents a mile to officers of the Navy while traveling under orders. For forty years the accounting officers had interpreted this as applying only to travel within the United States; while to officers traveling by sea or out of the country they allowed actual expenses and not mileage. The Supreme Court held that the statute made no such distinction, and that forty years' practice of the Department did not and could not change the law. Their right to mileage when traveling under orders, by sea and by land, at home and abroad, was upheld by the court. (United States vs. Temple, 105 U. S., 97; United States vs. Graham, 110 U. S., 219.)

In our opinion Congress intended to include paymasters' clerks among officers of the Navy to whom mileage is allowed by the act of 1876.

The demurrer is overruled, and judgment will be entered for the claimant in the sum of $83.28, with leave to have the judgment set aside if the defendants elect within ten days to plead to the petition.

10 IV.—*Final judgment.*

At a Court of Claims held in the city of Washington, D. C., on the 9th day of May, A. D. 1887, it was ordered that the demurrer be overruled and that judgment be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said David Mouat do have and recover of and from the United States the sum of eighty-three and twenty-eight one-hundredths dollars ($83.28).

It was further ordered that in case the defendants elect to plead to the petition within ten days the judgment be set aside.

11 V.—*Application of defendants for an allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 9th day of May, 1887, in favor of claimant, the defendants, by their Attorney-General, on the 16th day of May, 1887, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Assistant Attorney-General.

Filed May 14, 1886, and allowed in open court.

12 VI.

In the Court of Claims.

DAVID MOUAT
vs.
THE UNITED STATES. } No. 14856.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the opinion of the court overruling the demurrer, of the final judgment, of the application of defendants for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this twenty-fourth day of September, A. D. 1887.

[SEAL.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

(Indorsement on cover:) No. 1070. The United States, appellant, vs. David Mouat. Court of Claims. Filed September 27, 1887.

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In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANTS,
vs.
DAVID MOUAT. } No. 1070.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT, ASSIGNMENTS OF ERROR, AND BRIEF OF ARGUMENT OF APPELLANTS.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANTS,
vs.
DAVID MOUAT. } No. 1070.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT, ASSIGNMENTS OF ERROR, AND BRIEF OF ARGUMENT OF APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal from a judgment in the Court of Claims in favor of David Mouat against the United States for the sum of $83.28.

The case was heard in the court below upon demurrer.

The facts are stated in petition and exhibits thereto attached (Rec., pp. 1, 2, and 3).

The facts, as embodied in the petition and exhibit, are in substance:

Claimant was appointed, on the 16th of November, 1885, a paymaster's clerk in the U. S. Navy for duty on board the

United States receiving-ship *Vermont*. He accepted such appointment on the 19th of November, 1885. His appointment was made by E. W. Whitehouse, paymaster, U. S. Navy, and approved by A. P. Cooke, captain, commanding officer, and D. B. Harmony, Acting Secretary of the Navy. When he received his appointment he was in Chicago, where the appointment was addressed. He was directed to proceed to New York via Washington, D. C., a distance of 1,041 miles. He claims that under the act of Congress of June 30, 1876, he is entitled to receive the sum of 8 cents a mile for this distance, amounting to $83.28, but that such claim was not allowed, and that he has received no part thereof. That since the passage of the act of June 30, 1876, it has been the practice to allow mileage to paymaster's clerks, who were ordered to sea-going vessels, upon travel performed within the United States. It has never been the practice to consider clerks employed by pay officers on shore stations as being entitled to mileage.

By act of June 16, 1874, making appropriations for the Army, etc. (18 Stat., p. 72), it is enacted as follows:

> That only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States.

By *Act of June* 30, 1876 (19 Stat., ch. 29, p. 65), it is enacted as follows:

> And so much of the act of June 16, 1874, * * * as provides that only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, while engaged on public business, as is applicable to officers of the Navy so engaged is hereby repealed; and the sum of 8 cents per mile shall be allowed such officers while engaged, in lieu of their actual expenses.

The issue argued on demurrer was as to whether claimant is an officer of the Navy. The court below held that not only officers of the Navy legally appointed under the provisions of article 2, section 2, of the Constitution, but that "Congress used the word officers in its general, popular, and broad signification, rather than its narrow and technical one." It is claimed on the part of the United States that the act of 1876 is applicable only to legally appointed officers of the Navy.

ASSIGNMENTS OF ERROR.

The court erred—

1. In overruling the demurrer.

2. In rendering judgment in favor of the claimant for $83.28.

3. In holding (Rec., p. 4), "upon the authority of *Moore's Case* (95 U. S., 760), it may be that claimant should be held an officer in the constitutional sense of that term.

4. In holding (Rec., p. 4), "The position of the claimant in the Navy would seem to be well established by law as an officer, and his appointment as constitutionally made as the position and appointment of a passed assistant surgeon of the Navy."

5. In holding (Rec., p. 5), "that in the passage of laws like that under consideration Congress used the word officers in its general, popular, and broad signification, rather than in its narrow and technical one, derived wholly from the operation of provisions of the Constitution in re-

lation to certain appointments, and which, as one of the distinctions in the meaning of the word, has not yet found a place in the dictionaries."

6. In holding (Rec., p. 6), "Congress intended to include paymasters' clerks among officers of the Navy to whom mileage is allowed by the act of 1876."

BRIEF OF ARGUMENT.

The question as to whether a paymaster's clerk in the Navy is an officer of the Navy is discussed in appellant's brief in the case of *The United States, appellant*, vs. *Hendee*, submitted herewith, to which brief this court is referred.

A paymaster's clerk is not an officer within the provisions of the Constitution of the United States.

> The Constitution, for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when officers became numerous, and sudden removals necessary, this mode might become inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of Departments. That all persons who can be said to hold an office under the Government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt. This Constitution is the supreme law of the land, and no act of Congress is of any validity which does not rest on authority conferred by that instrument." (*United States* vs. *Germaine*, 99 U. S., 509.)

A paymaster's clerk is allowed certain paymasters in the Navy. (Rev. Stat., §§ 1386, 1387, 1388.)

The manner of his appointment is fixed by Naval Regulations (Nav. Reg. 1876, par. 9, p. 95).

> No person will be appointed a secretary who is not twenty-one years of age, nor a clerk who is under eighteen. Officers who nominate secretaries or clerks will be responsible for their character and fitness. Every officer entitled to a secretary or clerk may nominate him; but the appointment or discharge of a clerk by any officer not in command is subject to the approval of the commanding officer; the latter, however, will not refuse his approval except for good and sufficient reasons, which he will state in writing to such officer. No secretary or clerk will be entered upon the muster-roll of any vessel, nor be entitled to any pay, until he shall have accepted his appointment by letter, in duplicate, binding himself therein to be subject to the laws and regulations for the government of the Navy and the discipline of the vessel. One of these letters is to be transmitted immediately to the Department by the officer conferring the appointment, together with the oath of allegiance; the other copy will be preserved by that officer. In the case of any clerk appointed by an officer not in command, the letter of acceptance sent to the Department must bear the approval of the commanding officer. The acceptance of an appointment as secretary or clerk shall be understood as binding such person to serve with the officer who appointed him until regularly discharged. Should an enlisted man be appointed as clerk, the appointment does not release him from his enlistment.

In *Moore's Case* (95 U. S., 760), cited by the court below, it was held by this court that Moore (passed assist-

ant surgeon) was appointed under authority of law by the Secretary of the Navy. In *Hartwell's Case* (6 Wall., 388) it was held by this court that Hartwell was appointed by the head of a Department. In *Germaine's Case* (99 U. S., 508) it was held by this court that civil surgeons appointed by the Commissioner of Pensions were not officers, because not appointed by the head of a Department. The main question in the cases above referred to was as to what constitutes an officer of the United States. In the case of *Ex parte Reed* (100 U. S., 13) and *In re Bogart* (3 Sawyer, C. Cls. R., 407) the question presented was not as to whether a paymaster's clerk was an officer of the Navy, but as to whether a paymaster's clerk is a "person in the naval service," subject to its laws, regulations, and discipline. He was held *in* each of these cases to be so, not on the ground that he was an officer, but for the reason that by his letter of acceptance (Nav. Reg., *supra*) he had contracted to be so subject.

In the case of *Ex parte Reed, supra*, he is described as an officer, but this was simply descriptive of the person. The question as to whether he was an officer or not was not at issue.

If an officer at all, he is an officer attached to the Pay Corps. Section 1378, Revised Statutes, is as follows:

> All appointments to the Pay Corps shall be made by the President by and with the consent of the Senate.

Claimant was appointed by Paymaster Townsend. He was bound by the acceptance of the appointment "to serve with the officer who appointed him until regularly discharged" (Nav. Reg., *supra*). His duties were in aid of

the person who appointed him, who was responsible for his character and fitness (Nav. Reg., *supra*).

In the case at bar, the appointment was approved by the Acting Secretary of the Navy, but it acquired no force or validity thereby. He was appointed by the paymaster; his appointment approved by the commanding officer. If the Secretary of the Navy had withheld his approval, his right to the position of paymaster's clerk would have been as perfect as with it. If he was not an officer without the approval, such approval could not make him so. He is an officer appointed by the paymaster, not the Secretary of the Navy.

He is not an officer, recognized as such, by Congress or naval regulations.

Congress has power to authorize the President, courts of law, or heads of Departments to appoint officers of the United States, but has no power to appoint officers except such as are provided for by the Constitution. (*Germaine's Case, supra.*)

Nor has the head of a Department authority to appoint officers except where authorized by law. The wrong classification in an appropriation act of a person in the naval service as an officer who is not an officer does not make such person an officer in the legal acceptance of the term. Nor has a Department the right to create an office without authority of law. Nor can this court, by describing a person as an officer who is not legally so, confer upon him the rights, privileges, and benefits enuring to an officer recognized to be so within the provisions of the Constitution.

A paymaster's clerk is not classified as an officer by Naval Regulations in force since 1876.

Hon. I. H. Maynard, Comptroller, in an opinion dated February 5, 1886, in reference to this case, says:

> So far as I have been able to discover from an examination of the authorities and precedents bearing upon this point, it has never been held since the passage of the law of 1876 that mileage was legally and properly payable to any person in the naval service except commissioned and warrant officers of the Navy, and the term "officer of the Navy" has been uniformly construed to refer only to these classes of naval officers.
>
> In the Revised Statutes, relating to the pay of the Navy, section 1556, the persons in the naval service there referred to, and which include paymasters' clerks, are divided into two general classes: First, commissioned and warrant officers on the active list; secondly, petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employés of the Navy.
>
> In designating the status of paymasters' clerks, they must, I think, be assigned to the latter class under the head of employés. They are certainly not commissioned or warrant officers; that seems to be conceded; and even if they might be classed under the designation of petty officers, I am not aware that it has ever been held that this class was entitled to mileage. Under the act of 1874 they are entitled to reimbursement of their actual traveling expenses in all cases where such expenses have been properly incurred in the Government service. * * *
>
> They are unquestionably in the naval service, and may be made subject to such regulations and discipline as may be established for the good of the service; but the same remark is true with reference

to many other civilian employés, both in the military and naval service, who do not thereby acquire any official rank or status in such service.

If it is admitted that a person who is not legally an officer of the Navy may be popularly so regarded, because in special statutes or naval regulations he is so designated, no person so designated is embraced within the terms of the act of June 30, 1876, *supra.*

The act of June 16, 1874, *supra,* is a general law to the effect, viz,

> That only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States.

The act of June 30, 1876, repeals such law so far as it is applicable "to officers of the Navy so engaged."

The repeal of the act of 1874 only applies to "officers of the Navy." It is in full force and effect as to all in the Navy who are not "officers."

The words "officers of the Navy" in the act of 1876 are used in contradistinction to those persons in the Navy who are not officers, and are therefore used in their legal sense.

It is submitted that in a law passed for the benefit of "officers of the Navy" persons legally and actually officers are meant, and not persons who may be so called, described, or may be popularly known as such.

A paymaster's clerk may be an enlisted man, but his employment as a clerk does not release him from his enlistment. He is still an enlisted man, not an officer. If

by being appointed a paymaster's clerk he would become an officer, he would thereby be released from his enlistment.

It is submitted that the judgment of the court below should be reversed.

A. H. GARLAND,
Attorney-General.
ROBERT A. HOWARD,
Assistant Attorney-General.
F. P. DEWEES,
Assistant Attorney.

124-303

Office Supreme Court U. S.
FILED.
DEC 14 1887
JAMES H. McKENNEY.
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANTS,
vs.
DAVID MOUAT, APPELLEE.
} No. 1070.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE APPELLEE.

LINDEN KENT,

Solicitor for Appellee.

MILANS, PR., 519 7TH.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANTS,
vs.
DAVID MOUAT, APPELLEE. } No. 1070.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE APPELLEE.

STATEMENT OF THE CASE.

The Court of Claims rendered judgment in favor of the claimant, David Mouat, for $83.28, upon a demurrer to the petition filed by him.

This is an appeal from that judgment.

The petition and exhibits set forth the following facts:

The claimant, on the 16th day of November, 1885, was appointed "paymaster's clerk in the United States Navy for duty on board the U. S. receiving-ship Vermont." The appointment was made by E. N. Whitehouse, Paymaster U. S. Navy, from the "Navy Department, Washington, D. C.," and approved by D. B. Harmony, Acting Secretary of the Navy.

The claimant, at the time of his appointment, was in Chicago, Ill., and the letter of appointment directed

him to proceed to New York via Washington, D. C., a distance of 1,041 miles.

On the 19th November, 1885, the claimant accepted the appointment, and on the same day took an oath "well and faithfully to discharge the duties of the office;" proceeded to New York via Washington, and on the 30th of November, 1885, reported for duty in New York.

He claimed that under the act of Congress of June, 30th, 1876, he was entitled to receive the sum of eight cents per mile, for the distance of 1,041 miles traveled under orders, the same amounting to $83.28.

BRIEF OF ARGUMENT.

The demurrer to the petition brings before the court the only point involved in the case.

Whether or not the petitioner, as a paymaster's clerk, is an officer of the Navy within the contemplation of the act of June 30th, 1876. (19 *Stat. at Large, p.* 65.)

Under the act of June 16th, 1874, (18 Stat., p. 72,) it is enacted.

> "Only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mileages and transportation in excess of the amount actually paid, are hereby declared illegal."

By act of June 30th, 1876, (19 Stat., p. 65,) it is among other things enacted.

> "And so much of the act of June 16th, 1874, as provides that only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, while engaged on public business, as is applicable to officers

> of the Navy so engaged, is hereby repealed, and the sum of 8 cents per mile shall be allowed such officers while engaged in lieu of their actual expenses."

Was David Mouat, as paymaster's clerk, an officer of the Navy, entitled to 8 cents per mile traveling expenses, under the above Statute?

There is a method of appointment to office provided by the Constitution, Article II, Section 2, which declares that—

> "The President shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein provided for, and which shall be established by law: but the Congress may by law invest the appointment of such inferior officers as they think proper, in the President alone, in the courts, of law, or in the heads of departments."

The contention of the government is reduced to this proposition.

That no officer of the Navy is entitled to his traveling expenses of eight cents per mile, under the act of June 30, 1876, *unless he derives his appointment directly from constitutional warrant. That a paymaster's clerk is not so appointed, and hence is not entitled to the benefit of the law.*

There is no public policy suggested for placing such a limitation upon the word "officer," as to deprive that class of combatants who are universally in the statute, designated as "officers," from the benefits of this statute, while, as we shall show they are uniformly subjected to all the penalties inflicted upon "officers" in the necessary and proper administration of military discipline.

Whenever Congress has legislated with respect of paymasters' clerks, they have been invariably designated as officers of the Navy.

Section 1,410, Revised Statutes, which defines who are petty officers, also most clearly classes clerks as officers, not holding commissions or warrants, and not entitled to them, but still officers of the Navy. It provides that "all officers not holding commissions or warrants, or who are not entitled to them, except * * * and except secretaries and clerks, shall be deemed petty officers, *and shall be entitled to obedience, in the execution of their offices, from persons of inferior ratings*," declaring in terms that clerks in the Navy are officers; that they fill an office, and that in the execution of it, they shall be obeyed by persons of inferior rating, thus recognizing their relative rank.

Section 4,695, Revised Statutes, which provides for pension, in the case of total disability, declares that:

> "For cadet-midshipman, passed midshipman, midshipmen, clerks of admirals and paymasters and of other officers commanding vessels, second and third assistant engineer, master's mate, and all warrant-officers in the naval service, ten dollars per month; *and for all other persons whose rank or office is not mentioned in this section, eight dollars per month.*

For the purposes of a pension they are ranked with midshipmen, and second and third assistant engineers, and the pension is fixed by designation of the office.

They are thus ranked with the second assistant engineer, an office created by law and the appointment to which is specially vested in the President, "by and with the advice and consent of the Senate." (Rev. Stats., §§ 1390, 1391).

Paymasters' clerks are recognized and provided for by Statute. (Rev. Stats., §§ 1386, 1387, 1388).

These laws are found in the chapter of the Revised Statutes, providing for the *Organization* of the Navy, but are silent as to the manner of appointment of paymaster's clerks, which is left with the Executive.

In pursuance of the law, the manner of appointment is provided by *Navy Regulations* 1876, *p.* 95, established and declared "with the approval of the President of the United States," which regulation being made in pursuance of an act of Congress, and being necessary to carry it into execution, becomes a part of the law and is of the same force as if incorporated in the body of the act itself. (United States *vs.* Barrow, 1 Abb., U. S. R., 351; *Ex parte* Reed, 100 *U. S.*, 13).

An office provided by law, and filled in pursuance of the regulations of a department established according to law, is the act of the head of a department within the meaning of the Constitution, and this without the actual approval by the Secretary, although in the case of Mouat, the appointment made under the regulations was in point of fact approved by the Secretary.

A case in many respects analagous to this is *U. S. vs. Moore*, 95 *U. S.*, 760. Moore was called a "passed assistant surgeon" in the medical corps of the Navy.

In the chapter of the Revised Statutes, above referred to, providing for the *Organization* of the Navy, from whence is derived the authority for the appointment of paymasters' clerks, no provision is made for the office of "passed assistant surgeon."

Section 1368, *Revised Statutes*, provides:

> "The active list of the medical corps of the Navy shall consist of fifteen medical directors, fifteen medical inspectors, fifty surgeons, and one hundred assistant surgeons."

Section 1369,

> "All appointments in the medical corps shall be made by the President, by and with, the advice and consent of the Senate."

From the opinion of Mr. Justice Swayne in the Moore case, it appears that:

> "On the 12th of April, 1869, the appellee was appointed an assistant surgeon in the Navy of the United States. On the 24th of February, 1874, he was examined for promotion to the grade of surgeon. On the following day he was notified by the Secretary of the Navy that the report of the Board of Examiners was approved by the Department, and that from that date he would be regarded as a passed assistant surgeon."

Upon these facts and notwithstanding the two sections of Revised Statutes, 1368 and 1369, above, the court held that:

> "The place of passed assistant surgeon is an office, and the notification by the Secretary of the Navy was a valid appointment to it." (U. S. *vs.* Hartwell, 6 Wall., 385; Const. U. S., Art. II, Sec. 2).

This disposes of the argument that a paymaster's clerk is not an "officer" because if such, he is attached to the pay corps, and Section 1378, Revised Statutes provides that—

> "All appointments to the pay corps shall be made by the President, by and with the consent of the Senate."

The position of paymaster's clerk would seem to be more strongly established by law as an office, than that of "passed assistant surgeon;" for in the statutory provisions for the *Organization* of the Navy the status

of the clerk is fixed, while there is no recognition of that of the "passed assistant surgeon."

Paymasters' clerks receive *annual salaries* fixed by Statute (Rev. Stat., 1556); under the *Navy Regulations*, (*page* 95,) they are required to take an oath of office which oath is to be transmitted to the Department.

The position satisfies all the requisites of an office as defined in the *Hartwell* case. "An office is a public station, or employment, conferred by the appointment of Government. The term embraces the idea of tenure, duration, emolument and duties." The latter continuing and permanent, not occasional and temporary. (U. S. *vs.* Germaine, 99 U. S., 511).

This case grew out of the construction of a penal statute providing that "every officer of the United States who is guilty of extortion under color of his office shall be punished by a fine." (4 Stat. L., 118).

The court decided that within the meaning of this law, civil surgeons appointed by the Commissioner of Pensions, to make examination of pensioners when necessary, and to be paid by fees in each case were not officers of the United States. The court say:

> "If we look to the nature of the defendant's employment, we think it equally clear that he is not an officer. In that case (*United States vs. Hartwell*, 6 Wall., 385,) the court said the term embraces the idea of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us, the duties are *not* continuing and permanent, and they are occasional and intermittent. The surgeon is only to act when called upon by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examination in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Com-

missioner of Pensions of which we are not advised."

In contemplation of the permanency of the office of paymaster's clerk, Congress provides for an annual salary. He is required to take an oath of office, and the duties of his office not only take him from his home, but from his country.

Under statutes imposing *burdens* upon officers of the Navy, the Department holds that paymasters' clerks are embraced.

Sec. 4808:

> "The Secretary of the Navy shall deduct from the pay due each *officer*, seaman, and marine in the Navy, at the rate of twenty cents per month for each person, to be applied to the fund for navy hospitals."

Paymasters, *as officers*, are held by the Secretary of the Navy subject to the provisions of the above law. (See letter of Secretary, of Feb'y. 9, 1882, to the Fourth Auditor in the findings of the Hendee case, submitted with this case).

If they are held to be officers for the purpose of imposing a tax, and this is the construction put upon the act of Congress, they should certainly be held to be officers in the meaning of another act of Congress conferring benefits upon "officers of the Navy."

The terms of the acceptance, and the oath of office required by the regulations of the Navy (*supra*) make of the paymaster's clerk in the class of service to the government, a *combatant*, and not employment as a civilian.

He takes an oath "to comply with and be obedient to such laws, regulations, and discipline of the Navy as are now in force, or that may be enacted by Congress,

or established by other competent authority," and for the faithful discharge of the duties of the office.

The authority and manner of the appointment, and the duties it imposes, clearly fixes the *status* of the paymaster's clerk as a member of the military branch of the Navy, as contradistinguished to civil employment.

> "They are required to wear the uniform of the service, and have a fixed rank." (U. S. *vs.* Reed, 100 U. S., 13).

Officers and *enlisted men* constitute the whole *personnel* of the military branch of the Navy. It is conceded that "paymasters' clerks are not enlisted men and do not sign 'shipping articles,'" but that they are appointed, and take the oath of office prescribed by Revised Statutes, Sec. 1757, for all persons appointed to any office of honor or trust under the government.

Hence, it follows that if he has a *status* at all in the Navy it is as an *officer*.

We have shown that he has a *status* as a member of the Navy by express provisions of the statutes; by the Regulations of the Navy, and the particular orders of the Secretary.

This court in the case of *Reed*, *supra*, speaking through Mr. Justice Swayne, says:

> "The place of paymaster's clerk is an important one in the machinery of the Navy, their appointment must be approved by the commander of the ship. Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the Navy must be in writing, and filed in the Department. They must take an oath and bind themselves to serve until discharged. The discharge must be by the appointing power, and approved in the same manner as the appointment. They are required to wear the

uniform of the service; they have a fixed rank; they are upon the pay-roll, and are paid accordingly; they may also become entitled to a pension and to bounty land." (Navy Reg., of Aug. 7, 1876, p. 95. *In re Bogart*, 2 *Sawyer*, 396; *U. S. vs. Bogart*, 3 *Ben.*, 257; *R. S., Secs.* 4695, 2426).

"The good order and efficiency of the service depend largely upon the faithful performance of their duties. If these officers are not in the naval service, it may well be asked who are."

This was the law as laid down in a case administering penal law, where a paymaster's clerk was sentenced by a military court-martial to be imprisioned for two years, the loss of pay and a fine of $500 for *malefeasance* in office.

This punishment was inflicted upon the theory that he was an *officer* in the *naval service.*

If such is the adjudication of his official status in the administration of the law inflicting a punishment, it is difficult to see upon what construction he should be deprived of the benefits conferred by a statute upon officers of the Navy.

The answer of the Government to this position is, that the paymaster's clerk is a "person in the naval service," not an *enlisted man*, not an *officer*, but a person who, simply as a civil employé, has contracted to become subject to military discipline.

An anomalous position contrary to reason, to the statutory organization of the naval service, and to the regulations.

In the brief of the Attorney-General it is said, that the word "officer" is used in the Reed case as descriptive, but in point of fact it is a misdescription.

And that although Congress says, (Section 1410,) that a paymaster's clerk is an *officer* of the Navy, and legislates with respect to him as such, fixing his official

rank and status in the service, yet that he is not an officer within the meaning of the constitution, and that the "wrong classification * * * of a person in the naval service as an officer, does not make such person an officer in the legal acceptance of the term."

In order that a paymaster's clerk shall receive eight cents per mile, in lieu of the actual expenses, under the act of June 30, 1876, it is not essential that he should be an officer within the meaning of the Constitution, but it is only necessary that he shall be an officer within the meaning of Congress. If Congress, as the Supreme Court did, it is said in the *Reed* case, use the word "officer" as descriptive, and intended that such description should embrace paymaster's clerks, then there is nothing to prevent them from receiving the benefits of the act, although they are not appointed according to the provisions of the Constitution.

There is no constitutional limitation upon Congress which confines the provision of eight cents per mile, in lieu of actual expenses, to officers appointed exclusively under the provisions of the Constitution.

Nor is there any reason assigned why, in the construction of the law under consideration, the narrow and technical signification derived wholly from the operation of the provisions of the Constitution should be adapted, rather than the "general, popular and broad signification" given to the word uniformly by the courts, the Executive and Congress when found in statutes of this character, and particularly when the paymaster's clerk is deemed an officer within the meaning of the law imposing burdens and penalties, and by the Executive Eepartment in enforcing the same and in the regulations for quarters and mess at sea and on shore.

In the United States Naval Uniform Regulations of 1886, under the head of "Uniform for Officers of the Navy of the United States," the uniform of the pay clerk is prescribed. (P. 11, 12).

> "Warrant officers, mates, and pay clerks, shall wear the same devices on the collar of their service coat as are prescribed for the frock coat."

In the printed form prescribed by the Department for the quarterly report of the "List of Officers" on board the ship "Pay Officer's Clerks" are embraced.

Paymasters' clerks are "recognized and treated" as officers of the Navy by the "Statutes, the regulations, and the practice of the Navy Department," and there is no reason assigned for excepting them from such uniform recognition and treatment in the application of this statute, except that they are not officers appointed according to the provisions of the Constitution as is contended.

In the United States vs. Tinklepaugh, 3 *Blatch.*, 430, a deputy marshal appointed by the marshal, was held to be an officer, the court saying that "the Statute shows that Congress deemed deputies of the marshal to be officers of the United States."

> "The term officer, in its common acceptation, is sufficiently comprehensive to include all persons in any public station or employment conferred by government." (Vaugh *vs.* English, 8 Cal., 41).

> "But if a duty be a continuing one, which is defined by rules prescribed by the Government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a change or employment from an office, or the person who performs the duties from an officer." (*Chf. J. Marshall U. S. vs. Maurice*, 2 *Brock.*, 103).

In the case of *Ex parte Smith*, 2 Cranch., Cir. Ct. Rpts., 693. By the second section of the act of Congress, of the 8th of May, 1792, (1 St. L., 271), establishing a uniform militia throughout the United States, among the persons exempted by the act were "officers judicial and executive of the Government of the United States." It was held that Smith, a clerk in the Treasury Department, duly *appointed by one of the comptrollers*, and sworn in the manner required by the act of Congress, was an executive officer of the Government of the United States in the meaning of the above act, and not liable to be enrolled in the militia."

Under the above authorities the duties pertaining to the place of paymaster's clerk attach by virtue of its being an "office" and not under contract as an employé as contended by the Attorney-General.

In the *Hartwell* case it is said:

> "A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. *The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.*"

In view of this distinction, if any thing, he must be an officer and not an employé by virtue of a contract. Under this alleged contract between him and the government, *there are no duties "agreed upon and defined,"* but his duties arise by reason of his oath to "*faithfully discharge the duties of the office*" which "duties of office" are "defined by rules prescribed by the government, and not by contract." Hence, it follows that if his obligations do not arise by virtue of his "office" he owes the Government no duty.